2007

State of Utah v. Eric Pectol : Brief of Appellee

Utah Court of Appeals

Ryan Tenney; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Branden Miles; Deputy Weber County Attorney; Attorney for Appellee.
Randall W. Richards; The Public Defender Association of Weber County; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ERIC PECTOL, Defendant/Appellant.	Case No. 20060546-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF DISCHARGING A FIREARM FROM A VEHICLE, A THIRD DEGREE FELONY, IN THE SECOND DISTRICT COURT, WEBER COUNTY, THE HONORABLE PARLEY R. BALDWIN PRESIDING

RYAN D. TENNEY (9866)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Counsel for Appellee

RANDALL W. RICHARDS
2550 Washington Blvd., Ste. 300
Ogden, UT 84401
Telephone: (801) 399-4191

Counsel for Appellant

BRANDEN MILES
Deputy Weber County Attorney

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ERIC PECTOL, Defendant/Appellant.	Case No. 20060546-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF DISCHARGING A FIREARM FROM A VEHICLE, A THIRD DEGREE FELONY, IN THE SECOND DISTRICT COURT, WEBER COUNTY, THE HONORABLE PARLEY R. BALDWIN PRESIDING

RYAN D. TENNEY (9866)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
PO Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Counsel for Appellee

RANDALL W. RICHARDS
2550 Washington Blvd., Ste. 300
Ogden, UT 84401
Telephone: (801) 399-4191

Counsel for Appellant

BRANDEN MILES
Deputy Weber County Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **ERIC PECTOL,** **Defendant/Appellant.**	**Case No. 20060546-CA**

BRIEF OF APPELLEE

* * *

JURISDICTIONAL STATEMENT

Defendant was convicted of discharging a firearm from a vehicle, a third degree felony under Utah Code Annotated § 76-10-508 (West 2004). R. 99-102. This Court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(e) (West 2004).

ISSUE ON APPEAL & STANDARD OF REVIEW

Defendant stole a Blazer as a means of satisfying a drug debt. When the owner retrieved the Blazer, defendant followed him home, confronted him in the street, and fired a black .380 semiautomatic handgun at him from a moving vehicle.

Issue 1a: Did the trial court abuse its discretion by permitting the prosecutor to question a witness about whether he saw defendant with a black .380 semiautomatic handgun later that evening?

Issue 1b: Did the trial court abuse its discretion by admitting testimony regarding the underlying drug debt?

Standard of Review: A trial court's decision to admit evidence under rule 404(b), Utah Rules of Evidence, is reviewed for an abuse of discretion. *State v. Bradley,* 2002 UT App 348, ¶ 12, 57 P.3d 1139.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 76-10-508 (West 2004):

(1)(a) A person may not discharge any kind of dangerous weapon or firearm:

(i) from an automobile or other vehicle; . . .

(2) A violation of any provision of this section is a class B misdemeanor unless the actor discharges a firearm under any of the following circumstances not amounting to criminal homicide or attempted criminal homicide, in which case it is a third degree felony and the convicted person shall be sentenced to an enhanced minimum term of three years in prison:

(a) the actor discharges a firearm in the direction of any person or persons, knowing or having reason to believe that any person may be endangered;

(b) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure as defined in Subsection 76-6-101(2), discharges a firearm in the direction of any building; or

(c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.

Utah Rules of Evidence Rule 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rules of Evidence Rule 404(b):

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided

that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Defendant was charged with one count of discharging a firearm from a vehicle and one count of attempted murder. R. 1. In the first count, the State alleged that defendant fired a gun at Michael Wilbert from a moving vehicle. R. 342: 3-4. In the second, the State alleged that defendant shot Travis Montes after defendant returned to his apartment later that evening. R. 342: 4. Defendant subsequently filed a motion to sever the two charges. R. 46.[1]

The State's motions in limine

The State filed two pretrial motions in limine to determine the admissibility of testimony that it planned on introducing at trial. R. 342: 2-26. In the first motion, the State requested permission to examine Richard Porter about the Montes shooting. R. 342: 4-8. Porter was driving the car when defendant fired at Michael Wilbert, and he was also with defendant at defendant's apartment when the Montes shooting occurred. R. 342: 4-8. Porter told police the next day that defendant had a .380 semiautomatic during both shootings. R. 342: 6-7. This matched Michael Wilbert's description of the gun that

---

[1] The record does not contain a ruling on the motion to sever. In his appellate brief, defendant states that the motion to sever was granted. Aplt. Br. 5. Because defendant received two separate trials, R. 99-102; 290-94, the State agrees that the motion to sever was at some point granted.

This appeal is from defendant's conviction of discharging a firearm from a vehicle. Aplt. Br. 1-22. Unless otherwise indicated, all references in this brief are to the proceedings relating to that charge.

defendant had fired at him. R. 342: 8. The State accordingly sought permission to question Porter at trial regarding the Montes shooting in order to support its claim that defendant had a .380 semiautomatic handgun during the Wilbert shooting. Defendant objected, arguing that this evidence was inadmissible under rules 403 and 404(b), Utah Rules of Evidence. R. 342: 9-13.

Following argument, the trial court ruled that Porter could testify regarding defendant's possession of a gun at the apartment, the type of gun that he had, and whether Porter had heard defendant fire the gun. R. 342: 25. The court also ruled that Porter could not testify regarding the fact that defendant had shot someone with the gun. R. 342: 25.

In the second motion in limine, the State requested permission to question Porter regarding a drug deal that defendant had with Stacy Wilbert. The State alleged that this drug deal was the basis for defendant's confrontation with the Wilberts and that it therefore provided context and motive for the shooting. R. 342: 8-9.

Defendant did not object to this second motion in limine, but instead affirmatively agreed that the evidence was admissible. R. 342: 14. Given this concession, the State did not argue the drug issue during its rebuttal. R. 342: 15. After the court ruled on the gun issue, it asked if either party needed clarification. R. 342: 25. Defendant's counsel did not ask for a ruling on the drug issue, but instead again affirmed that he did not have any objection to that testimony. R. 342: 25 ("[The] Drug testimony is fine."). At trial, defendant's counsel openly discussed the drug testimony with the jury. R. 343: 100-03,

140; 344: 385 (informing the jury that it was "entitled to know" about the "elements of drug involvement" in the case).

Richard Porter testifies regarding defendant's possession of the .380 semiautomatic at trial

Porter testified at trial. R. 343: 152-219; 344: 219-247. When the prosecutor asked him whether defendant had a gun at his apartment, the court excused the jury and specifically instructed Porter not to mention that defendant had shot anyone at the apartment. R. 343: 178-85. Pursuant to the court's instructions, Porter was not allowed to inform the jury that defendant had shot anyone. R. 343: 152-219; 344: 219-248. Instead, the State questioned Porter about the Wilbert confrontation, as well as his statement to police that defendant had possessed and fired a .380 later that night. R. 343: 152-210; 344: 219-248.

Porter ultimately recanted most of the statements that he had made to police during their investigation. Porter denied that he and defendant had followed the Wilberts home, instead claiming that he and defendant had "just happened to come upon them" in front of their home. R. 343: 173. Porter still admitted that there had been an "angry" confrontation in front of the Wilbert home, but now claimed that defendant did not have a gun at that time. R. 343: 168-74, 175, 195-96.

Defendant was convicted and timely appealed. R. 102, 162.

STATEMENT OF FACTS[2]

Stacy Wilbert began selling methamphetamine to defendant in the spring of 2004. R. 343: 81-82. Defendant subsequently loaned Stacy Wilbert $2400 so that she could buy a quarter pound of methamphetamine. R. 343: 81-83. In return, Stacy Wilbert agreed to give defendant an ounce of methamphetamine and then repay the loan after she had sold the other three ounces. R. 343: 82. Stacy Wilbert later sold the methamphetamine and repaid defendant. R. 343: 83. Defendant, however, believed that Stacy Wilbert still owed him between $400 and $450. R. 343: 83.

Michael Wilbert, Stacy's husband, subsequently loaned his Chevy Blazer to defendant's live-in girlfriend while he was repairing her car. R. 343: 121, 123. On September 6, 2004, defendant's girlfriend informed Michael Wilbert that defendant had taken the Blazer. R. 343: 121-22. When Michael Wilbert called defendant, defendant told him that he took the Blazer because of Stacy Wilbert's drug debt. R. 343: 124, 141. Defendant and Michael Wilbert then exchanged obscenities and threats over the phone. R. 343: 122.

Later that night, Michael and Stacy Wilbert met and went looking for their Blazer. R. 343: 85-86. They found it parked behind defendant's apartment. R. 343: 86, 126. Michael Wilbert retrieved the Blazer, and he and his wife began driving it home together. R. 343: 86-87, 126.

---

[2] The following facts are recited in the light most favorable to the jury verdict. *See State v. Litherland*, 2000 UT 76, ¶2, 12 P.3d 92.

Defendant and his long-time friend Richard Porter had spent the day building shelves at Porter's house. R. 343: 154-55, 157. At some point in the evening, Porter and defendant went driving in Porter's white Cadillac. R. 343: 152, 161-62. Defendant was "tweaking hard" on methamphetamine at the time, R. 343: 201, and Porter was driving. R. 343: 161-62, 189.

As the Wilberts were driving home, they noticed that a white Cadillac had begun following them. R. 343: 87-90, 128. As the white Cadillac pulled up behind them, it began flashing its headlights. R. 343: 88-89, 128. The white Cadillac followed the Wilberts all the way to their home. R. 343: 88-90.

Michael Wilbert stopped the Blazer in the middle of the road in front of their driveway. R. 343: 90, 104-06. The Cadillac stopped about 10 feet behind them. R. 343: 104-06. Stacy Wilbert got out of the Blazer and approached the passenger side of the Cadillac to see who had been following them. R. 343: 90. Defendant stepped out of the passenger side door of the Cadillac and began yelling at Stacy Wilbert. R. 343: 92. Defendant called her a "f---in' cunt" and told her that he wanted his money. R. 343: 92.

Defendant raised a small black handgun into the air. R. 343: 130-31. Stacy shouted at her husband, "Michael, he's got a gun. He's got a gun, go go." R. 343: 130, 175. Stacy Wilbert then ran toward her house. R. 343: 93.

Michael Wilbert threw the Blazer into reverse and "was going to back up into the Cadillac to create a diversion" and "to try to keep from getting shot." R. 343: 131. Defendant jumped back into the Cadillac, and the Cadillac sped off. R. 343: 131.

Michael Wilbert turned around and followed the Cadillac. R. 343: 131. After both cars had turned the corner, defendant "leaned out the passenger side window and discharged a shot out of the firearm in [Michael Wilbert]'s direction." R. 343: 132. Michael Wilbert heard the sound and saw the muzzle flash from defendant's gun. R. 343: 132. Michael Wilbert has personal experience with guns and recognized that the shot had come from a .380 semiautomatic. R. 343: 132-33. Michael Wilbert followed the Cadillac a little bit further and then returned to his house. R. 343: 132.

Shortly after the cars had pulled away and turned the corner, Stacy Wilbert heard a sound "like a firecracker." R. 343: 93, 110. She ran inside her house and told her roommate Nicki Mancuso that "they were shooting at Michael." R. 343: 94; 344: 333. Keira Iman, a neighbor of the Wilberts, heard a "firecracker noise" that night as well and thought that it sounded like a gunshot. R. 344: 331-32.

As defendant and Porter drove away, Porter turned to defendant and said, "What the f---, man?" R. 343: 208. Defendant responded, "Oh sorry, I just lost it." R. 343: 208. The two went to Porter's home for approximately 45 minutes and then drove to defendant's apartment. R. 343: 176. While Porter was standing in defendant's kitchen, he heard defendant fire his gun in another room. R. 343: 176-77.[3]

Police spoke with Porter the next morning as part of their investigation into the shooting at defendant's apartment. R. 344: 267-68. In his initial statement, Porter told police that defendant had used a small, black, semi-automatic pistol. R. 344: 270. In a

---

[3] As noted above, this shooting was the subject of the attempted murder charge. Defendant was convicted on that charge in a subsequent trial. R. 290-96.

subsequent interview, Porter clarified that the gun was a .380 semi-automatic. R. 344: 282. Several days after retrieving his Blazer, Michael Wilbert found a clip of bullets underneath the driver's seat. R. 343: 135, 144. The clip did not belong to Michael, and he did not know how the clip got into his car. R. 343: 144. Michael turned the clip over to the police, who determined that the clip contained bullets for a .380. R. 344: 298.

SUMMARY OF ARGUMENT

Defendant first argues that the trial court abused its discretion by admitting testimony that defendant had possessed and fired a .380 handgun at his apartment shortly after the Wilbert shooting. Defendant claims that this testimony should have been excluded under rule 404(b). The trial court expressly prevented the State from introducing any evidence that the possession or shooting was in any way criminal, however, and this testimony therefore did not fall within the ambit of rule 404(b).

Contrary to defendant's claims, this testimony was also admissible under rule 404(b). The testimony was not introduced as evidence of defendant's character, but rather to support the State's claim that defendant had an operable .380 handgun on the night in question. The testimony was directly relevant to the elements of the crime at issue, and defendant was not unfairly prejudiced by its admission.

Defendant next claims that the trial court abused its discretion by admitting testimony regarding his drug deal with Stacy Wilbert. Defendant invited the alleged error, however, by affirmatively conceding that this testimony was admissible. This Court should therefore decline to address this claim.

Contrary to defendant's claims, this testimony was also admissible under rule 404(b). The testimony was properly introduced to provide motive and context for the defendant's confrontation with the Wilberts, and defendant was not unfairly prejudiced by its admission.

ARGUMENT

THE COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE CHALLENGED TESTIMONY

Defendant argues that the court abused its discretion by (1) allowing the State to question Porter regarding the shooting at defendant's apartment, and (2) allowing the State to introduce testimony regarding defendant's drug deal with Stacy Wilbert. Aplt. Br. 14-21. Defendant argues that this testimony should have been excluded under rules 403 and 404(b), Utah Rules of Evidence. Aplt. Br. 14-21.

As explained below, however, Porter's testimony regarding the shooting was relevant to show that defendant possessed the crime weapon on the night in question. Porter's testimony regarding his drug deal with Stacy Wilbert was also relevant to establish his motive for taking the Blazer and then shooting at Michael Wilbert. Both of defendant's arguments should be rejected.

A. The trial court did not abuse its discretion by allowing the State to question Porter about the shooting at defendant's apartment.

The Utah Supreme Court has established a three-step process for analyzing claims under rule 404(b). First, the court must "determine whether the bad acts evidence is being offered for a proper, noncharacter purpose." *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 18, 6 P.3d 1120. Second, the "court must determine whether the bad acts evidence

meets the requirements of rule 402, which permits admission of only relevant evidence." *Id.* at ¶ 19. Third, the court must "determine whether the bad acts evidence meets the requirements of rule 403 of the Utah Rules of Evidence." *Id.* at ¶ 20.

1. **Rule 404(b) is inapplicable to this claim because the State did not introduce any testimony showing that this shooting was in any way wrongful.**

As a threshold matter, this Court should reject defendant's claim because it does not implicate evidence within the scope of rule 404(b).

Rule 404(b) only applies when a party offers evidence of "other crimes, wrongs or acts." It is a "fundamental principle of statutory construction that 'terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.'" *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) (citations omitted). The meaning of words should accordingly "be determined in light of their association with surrounding words and phrases." *Id.* (citations omitted); *see also Calhoun v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 56, ¶ 18, 96 P.3d 916 ("[W]hen deciding questions of statutory interpretation we do not look to language in isolation. Rather, we look first to the statute's plain language, in relation to the statute as a whole, to determine its meaning."). In addition, "the rule of *ejusdem generis* requires that 'when general words or terms follow specific ones, the general must be understood as applying to things of the same kind as the specific.'" *CP Nat. Corp. v. Pub. Serv. Comm'n of Utah*, 638 P.2d 519, 523 (Utah 1981) (citation omitted).

As noted above, rule 404(b) applies when a party introduces evidence regarding "crimes, wrongs or acts." Though the terms "crimes" and "wrongs" both specifically

connote impropriety, the general term "acts" is left undefined. Given the rules of construction referenced above, courts have commonly held that the term refers to "bad acts." *See, e.g.*, *United States v. Jobson*, 102 F.3d 214, 219 n.4 (6th Cir. 1996); *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994); *United States v. Cooper*, 577 F.2d 1079, 1087-88 (6th Cir. 1978); *State v. Crane*, 799 P.2d 1380, 1384 (Ariz. 1990); *Gattis v. State*, 637 A.2d 808, 818-19 (Del. 1994); *Klauenberg v. State*, 735 A.2d 1061, 1071-73 (Md. Ct. App. 1999). Utah's courts have implicitly adopted this construction by repeatedly discussing the rule in terms of "bad acts." *See, e.g.*, *State v. Houskeeper*, 2002 UT 118, ¶ 28, 62 P.3d 444; *State v. Johnson*, 2007 UT App 184, ¶¶ 29-34, 579 Utah Adv. Rep. 5; *State v. Harter*, 2007 UT App 5, ¶¶ 23-31, 155 P.3d 116; *State v. Norcutt*, 2006 UT App 269, ¶¶ 21-23, 139 P.3d 1066; *State v. Atkin*, 2006 UT App 155, ¶¶ 16-17, 135 P.3d 894.

In *State v. Lee*, 886 A.2d 378 (Vt. 2005), the Vermont Supreme Court rejected a rule 404(b) claim similar to this one because the defendant had "not explained how the mere possession of a firearm amounts to a bad act. The trial court's ruling recognizes that gun ownership in Vermont is not unusual. . . . Absent evidence to demonstrate that defendant's gun possession was somehow wrongful, the court was not required to analyze admission of the evidence under a Rule 404(b) standard." *Id.* at 384. In *Pickens v. State*, 764 N.E.2d 295 (Ind. Ct. App. 2002), the Indiana Court of Appeals likewise held that "it is 'by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior 'bad acts' for 404(b) purposes.'" *Id.* at 299 (citation omitted). A number of other courts have reached similar results. *See, e.g.*, *Sims v. State*, 928 So.2d

984, 990 (Miss. Ct. App. 2006) ("Sims does not direct this Court to any precedent indicating that the contemporaneous possession of an extra gun during a shooting constitutes a prior bad act within the ambit of M.R.E. 404(b)."); *State v. Loftin*, 670 A.2d 557, 565-66 (N.J. Super. Ct. App. Div. 1996) ("[T]he rubber mask, the bullets, and the testimony revealing that defendant's gun was in possession of the authorities from another jurisdiction bear no resemblance to the other wrongs or acts addressed by the courts with respect to N.J.R.E. 404(b). It is neither illegal nor wrongful to possess a rubber mask or ammunition."); *State v. Reid*, 213 S.W.3d 792, 814 (Tenn. 2006) ("In our view, the ownership of these weapons, standing alone, does not constitute a crime. The testimony that Roberts saw the defendant in the possession of weapons similar to those used in the crimes did not necessarily constitute evidence of a bad act.").

The trial court in this case expressly limited the discussion of the shooting at the apartment. The State was allowed to question Porter about whether he saw defendant with a gun later that night, the type of gun, and whether defendant had fired it, but the State was not allowed to question Porter about whether defendant had shot anyone with the gun. The State also did not introduce any evidence indicating that the shooting at the apartment had in any way been criminal. Given this, the testimony was simply not "bad act" evidence and it was therefore not subject to rule 404(b).

2. The testimony regarding the shooting at the apartment was introduced for the proper purpose of establishing the elements of the crime at issue.

Even if rule 404(b) was applicable, it was not violated in this case. As noted above, the first step in the rule 404(b) analysis is to determine the purpose for which the

evidence was offered. *Nelson-Waggoner*, 2000 UT 59, ¶ 18. Under rule 404(b), evidence of "other crimes, wrongs or acts" cannot be offered to "prove the character of a person in order to show action in conformity therewith." Such evidence may be offered, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Utah R. Evid. R. 404(b).

Rule 404(b) is an "inclusionary rule with regard to other crimes evidence which is offered for a proper, noncharacter purpose." *State v. Decorso*, 1999 UT 57, ¶ 24, 993 P.2d 837. "Rule 404(b) does not exclude evidence unless it fits an exception; rather, it allows admission of relevant evidence 'other than to show merely the general disposition of the defendant.'" *State v. Jamison*, 767 P.2d 134, 137 (Utah App. 1989) (citation omitted). "Evidence demonstrating other purposes is not precluded so long as the evidence is offered for a legitimate purpose other than to show the defendant's propensity to commit the crime charged." *State v. Allen*, 2005 UT 11, ¶ 17, 108 P.3d 730. Thus, "[p]rior bad act evidence is only excluded where the *sole* reason it is being offered is to prove bad character or to show that a person acted in conformity with that character." *State v. O'Neil*, 848 P.2d 694, 700 (Utah App. 1993) (emphasis in original).

The testimony regarding the apartment shooting was offered for two proper purposes. First, the testimony was offered to support Michael Wilbert's claim that defendant fired a .380 at him, thereby satisfying an element of the crime at issue. In *State v. Bisner*, 2001 UT 99, 37 P.3d 1073, the supreme court held that bad act evidence is admissible where it "tends to prove some fact that is material to the crime charged . . . other than the defendant's propensity to commit crime." *Id.* at ¶ 55 (internal quotations

and citation omitted)). In *Jamison*, this Court likewise held that "[e]vidence that tends to prove an element of the crime is admissible." 767 P.2d at 137. While the rule therefore "precludes admission of evidence of prior bad acts to prove the *disposition* of an accused to commit the crime charged," such evidence "can be admitted to prove commission of the crime when the evidence is otherwise relevant to an element of the crime." *State v. Collier*, 736 P.2d 231, 234 (Utah 1987) (emphasis in original). "When evidence establishes elements of the crime of which the defendant is accused, it is admissible even though it tends to prove that the defendant has committed other crimes." *O'Neil*, 848 P.2d at 700 (internal quotations and citation omitted).

In order to convict defendant, the State was required to prove that defendant fired a firearm during his confrontation with the Wilberts. Utah Code Annotated § 76-10-508(1)(a) (West 2004). Although the State did not have forensic evidence proving that defendant fired a gun at Michael Wilbert, it did have the testimony of Michael Wilbert, who claimed that defendant had fired at him with a .380. R. 343: 132-33. Porter's initial statements to police supported this claim, insofar as Porter had specifically told officers that defendant had a .380 semiautomatic later that night at his apartment. R. 343: 196-97. Insofar as the State claimed that this was the same weapon, Porter's testimony directly linked defendant to the crime at issue and was therefore admissible for that purpose. *See United States v. Shea*, 159 F.3d 37, 38-39 (1st Cir. 1998); *United States v. Smith*, 101 F.3d 202, 211 (1st Cir. 1996); *United States v. Roberts*, 933 F.2d 517, 520 (7th Cir. 1991); *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989).

Second, the testimony was also properly admitted to establish that defendant had the opportunity to commit the crime at issue. When faced with similar challenges, courts have commonly allowed the government to introduce evidence that the defendant had access to the crime weapon in order to show that the defendant had the opportunity to commit the crime at issue. *See, e.g.*, *Jobson*, 102 F.3d at 221; *United States v. Hamilton*, 992 F.2d 1126, 1130-31 (10th Cir. 1993); *United States v. Covelli*, 738 F.2d 847, 855 (7th Cir. 1984); *People v. Rivers*, 70 P.3d 531, 538 (Colo. Ct. App. 2002); *Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001); *State v. Knox*, 464 N.W.2d 445, 449 (Iowa 1990); *Smith v. State*, 729 So.2d 1191, 1205-06 (Miss. 1998); *Andrews v. State*, 78 S.W.3d 13, 19-20 (Tex. Crim. App. 2002).

In this case, Michael Wilbert testified that defendant fired at him using a .380 semiautomatic. Porter's testimony confirmed that defendant had an operable .380 semiautomatic less than an hour after the shooting, thereby establishing defendant's access to the gun in question and accordant opportunity to commit this particular crime. This was a proper purpose under rule 404(b).

3. The testimony regarding defendant's possession of a .380 was relevant.

The second step in a rule 404(b) analysis is to determine whether the evidence was relevant. *Nelson-Waggoner*, 2000 UT 59, ¶ 19. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. R. 401. "Under the minimal threshold of Rule 401, relevancy objections should

be seldom sustained if counsel offering the evidence can explain the rational connection between the evidence offered and the issues of consequence in the case." R. Collin Mangrum & Hon. Dee Benson, *Mangrum & Benson on Utah Evidence* 108 (2005). "If evidence would make a disputed fact of consequence more probable in any degree, then the evidence satisfies the level of probative value required by Rule 401." *Id.* at 109. In addition, "if the evidence has relevancy to explain the circumstances surrounding the instant crime, it is admissible for that purpose; and the fact that it may tend to connect the defendant with another crime[, wrong, or act] will not render it incompetent." *State v. Johnson*, 784 P.2d 1135, 1141 (Utah 1989); *see also Collier*, 736 P.2d at 234 ("The evidence can be admitted to prove commission of the crime when the evidence is otherwise relevant to an element of the crime."); *Jamison*, 767 P.2d at 137 ("Evidence that tends to prove an element of the crime is admissible.").

As discussed above, Richard Porter told officers that defendant had an operable .380 handgun with him shortly after the Wilbert shooting, which corroborated Michael Wilbert's claim that defendant had fired a .380 semiautomatic at him from Porter's Cadillac. This made it more probable that defendant fired a .380 at Michael Wilbert than it would have been without the testimony, and it was therefore directly relevant under rule 402.

4. The probative value of the gun evidence was not substantially outweighed by the danger of unfair prejudice.

The third step in a rule 404(b) analysis is to determine whether the evidence "meets the requirements of rule 403 of the Utah Rules of Evidence." *Nelson-Waggoner*, 2000 UT 59, ¶ 20.

Under rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." When bad acts evidence is challenged under rule 403, this Court considers "'a variety of matters . . . including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.'" *State v. Holbert*, 2002 UT App 426, ¶ 32, 61 P.3d 291 (citation omitted). This testimony was admissible under this test.

First, the evidence introduced at trial not only established that defendant had fired a .380 at his apartment, but also linked that shooting to the events in question here. Specifically, Richard Porter gave a statement to police following the shootings in which he stated that defendant had fired a .380 at the apartment. Porter's reference to a .380 directly corroborated Michael Wilbert's claim that defendant had and fired a .380 at him from Porter's car earlier that evening.[4]

---

[4] But for defendant's objection, Porter's claim that defendant shot the gun in his apartment would also have been corroborated by the same evidence that was subsequently used to convict defendant of attempted murder.

In addition, the fact that these cases were severed from each other does not mean that the evidence from the Montes shooting would have been inadmissible in the first

Second, the interval of time between the two incidents was insignificant. In *Decorso*, the supreme court referred to an interval of seven months as being "relatively short" for purposes of rule 403. *Decorso*, 1999 UT 57, ¶ 32. In *Holbert*, this Court referred to an interval of approximately three months as "minimal." 2002 UT App 426, ¶ 41. The interval in this case was not one of months or even weeks, but was instead approximately 45 minutes.

Third, the State needed this evidence. As discussed above, because there was no forensic evidence linking defendant to the Wilbert shooting, the State had to prove its case based on eyewitness testimony alone. Though Michael Wilbert testified that defendant fired a .380 at him from the moving car, R. 343: 132-33, that statement was directly contradicted at trial by Porter, who now claimed that defendant did not have a gun during the Wilbert confrontation. R. 343: 175, 195-96. Porter's statements regarding the shooting at the apartment therefore corroborated Michael Wilbert's claim that defendant had a .380 during their confrontation earlier that night, and they also rebutted his new claim that defendant did not have a .380 earlier that evening.

Finally, this testimony was not the type that would lead to "unfair prejudice," Utah R. Evid. R. 403, or "'rouse the jury to overmastering hostility.'" *Holbert*, 2002 UT App 426, ¶ 32 (citation omitted). In *State v. Maurer*, 770 P.2d 981 (Utah 1989), the Utah Supreme Court noted that "all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered." *Id.* at 984. Given this, "prejudice

---

trial. In *State v. Johnson*, 748 P.2d 1069 (Utah 1987), the supreme court specifically held that "the severance of two crimes for trial does not necessarily preclude the admission of evidence of the severed crime in the trial of the other." *Id.* at 1075.

which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution, or horror." *Id.* at 984 (internal quotation marks and citation omitted). Evidence is therefore deemed to be directed at an "improper basis" when it has an undue tendency to "cause the jury to base its decision on something other than the established propositions of the case." *State v. Lindgren*, 910 P.2d 1268, 1272 (Utah App. 1996) (internal quotation marks and citation omitted).

There was nothing emotional or diversionary about this testimony. Given the court's instructions, this jury did not hear that defendant had actually shot someone with his gun at his apartment, nor did it learn that there had been anything criminal or wrongful about his conduct there. Instead, the jury simply learned that defendant possessed an operable handgun and that he had fired it. Gun possession is neither criminal nor uncommon in this state, so defendant was clearly not prejudiced by Porter's testimony regarding defendant's possession of a gun. The fact that defendant fired it is of no particular consequence either. Absent any evidence to the contrary, the jury could have made any number of innocuous assumptions regarding that shooting, such as that defendant accidentally misfired his gun. This Court should therefore disregard defendant's unsupported speculation that this decidedly neutral information was inherently and unfairly prejudicial.

To the extent that defendant was prejudiced by this testimony, it was only because this particular gun matched the description of the gun that he was seen firing at Michael

Wilbert during their confrontation approximately 45 minutes earlier. This is probative prejudice, not unfair prejudice, and it was not precluded by rules 403 or 404(b).[5]

5. Even if the admission of the challenged testimony was error, it was harmless error.

"[E]ven if we assume that the evidence was improper, an appellate court will not overturn a jury verdict for the admission of improper evidence if the admission of the evidence did not reasonably effect the likelihood of a different verdict." *Houskeeper*, 2002 UT 118, ¶ 26. "Moreover, as a general rule, in reviewing a jury verdict we assume that the jury believed the evidence supporting the verdict." *State v. Brown*, 948 P.2d 337, 343-44 (Utah 1997).

Although the State was not able to forensically prove that defendant fired a gun at Michael Wilbert, it nevertheless offered testimony that otherwise supported its claim. Porter testified that he and defendant had followed the Wilberts home, and he then described the "angry" confrontation that ensued in the middle of the street. R. 343: 168-

---

[5] Defendant also suggests that this Court should incorporate rule 609, Utah Rules of Evidence, into its rule 404(b) analysis. Aplt. Br. 17-20. This Court has previously held that if evidence is admissible under rule 404(b), consideration under rule 609 is unnecessary. *State v. Holbert*, 2002 UT App 426, ¶ 29 n.3, 61 P.3d 291; *State v. O'Neil*, 848 P.2d 694, 701 n.7 (Utah App. 1993). As set forth above, the challenged testimony is admissible under rule 404(b), thereby negating any need for a rule 609 analysis.

In any event, rule 609 is inapplicable to this case. Rule 609 applies when a party attempts to introduce evidence of a witness's "conviction" for "the purpose of attacking the credibility" of that witness. Defendant had not been tried, let alone convicted of the Montes shooting at the time of this trial. Rule 609 and the interpretive cases cited by defendant are therefore inapplicable to this case. Defendant also "did not object to the evidence in the context of rules 608 and 609" below, and this Court should accordingly "decline to engage in further analysis" of the rule 609 argument. *Holbert*, 2002 UT App 426, ¶ 29 n.3.

74.[6] Defendant did not testify or in any way deny that claim. Stacy Wilbert then saw defendant with a gun, shouted a warning to her husband, and fled toward her house. Moments later, she heard a firecracker-like noise and told a roommate that "they were shooting at Michael." A neighbor also testified that she heard a noise that sounded like a gunshot during that timeframe as well. More importantly, Michael Wilbert testified that he saw and heard defendant's shot, and recognized it as coming from a .380 semiautomatic.

Thus, even without the testimony regarding the subsequent shooting at defendant's apartment, the State still presented competent testimony from multiple sources that supported its central claims. If this Court holds that the testimony should have been excluded under rule 404(b), this Court should hold that the error was harmless and accordingly still affirm the conviction.

B. The trial court did not abuse its discretion by allowing the State to introduce evidence regarding defendant's drug deal with Stacy Wilbert.

Defendant next claims that the trial court abused its discretion by permitting the State to introduce testimony regarding his drug deal with Stacy Wilbert. This claim should be rejected.

As a threshold matter, this Court should reject this claim under the invited error doctrine. "The invited error doctrine prevents a party from taking advantage of an error

---

[6] At trial, Porter initially denied having followed the Wilberts. R. 343: 162. After the State received permission to treat him as a hostile witness, Porter admitted to having "flip[ped] around" behind the Wilberts, R. 343: 167, but still claimed that he and defendant had "just happened to come upon" the Wilberts in front of their home. R. 343: 173. Upon further questioning, Porter admitted to "follow[ing] the same path" as the Wilberts as they drove toward their home. R. 343: 190.

committed at trial when that party led the trial court into committing the error. Affirmative representations that a party has no objection to the proceedings fall within the scope of the invited error doctrine because such representations reassure the trial court and encourage it to proceed without further consideration of the issues." *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 12, 576 Utah Adv. Rep. 24 (internal quotations and citations omitted). In this case, defense counsel affirmatively stated that he thought the evidence regarding the drug deal was admissible. R. 342: 14 ("I don't think that we can . . . stop the State from asking them about drugs. We don't agree with it, we don't agree that what they're saying is true, and I can deal with that in cross-examination. I suppose if they want to claim that Mr. Pectol said that, then that's something we have to do."); 342: 25 ("[The] Drug testimony is fine."). At trial, defense counsel affirmatively raised this issue when cross-examining several of the State's witnesses. While cross-examining Michael Wilbert, for example, the following exchange occurred:

> Q: Now, you indicated that you'd known Eric for a couple of months before all this happened, would that be about right?
>
> A: Yeah.
>
> Q: And the relationship—and I'll tell you that your wife was in here earlier and testified before the jury and described a relationship basically that involved the use of drugs. Would that be your view of what the relationship between you and your wife and Eric was?
>
> A: Yes sir, use and sale of—
>
> Q: I'm sorry?
>
> A: Use and sale.

Q: And according to Stacy she was doing the selling primarily; is that right?

A: Yes.

R. 343: 139-40. Defendant similarly raised it when cross-examining Stacy Wilbert. R. 343: 100-03, and again during his closing statement. R. 344: 385 (informing the jury that it was "entitled to know" about the "elements of drug involvement" in the case). A defendant cannot concede admissibility below and then contest admissibility on appeal. Defendant's concession below invited the error of which he now complains, and this Court should accordingly decline to address it.

Even if this Court addresses this claim on the merits, it should still be rejected.

First, the testimony was offered for a proper purpose under rule 404(b). Rule 404(b) expressly allows bad act evidence to be introduced for purposes of establishing a party's motive. In *Bisner*, for example, the Utah Supreme Court held that evidence of a prior drug deal between the defendant and his victim was admissible "for the noncharacter purpose of proving [defendant's] motive and intent in killing" the victim. 2001 UT 99, ¶ 57.

Bad act evidence can also be admitted in order to provide context for the State's case. This Court has previously held that a prosecutor is "entitled to paint a factual picture of the context in which the events in question transpired" and can present evidence of bad acts "as background information" if needed to explain "how the charges against [the defendant] came forward." *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah App. 1991). Thus, bad acts can be discussed "to show the general circumstances

surrounding" the crime at issue. *State v. Pierce*, 722 P.2d 780, 782 (Utah 1986); *see also State v. Boyd*, 2001 UT 30, ¶ 24, 25 P.3d 985 (allowing presentation of prior bad acts as "background" for the State's case-in-chief); *State v. Daniels*, 584 P.2d 880, 882 (Utah 1978) (allowing the State to present evidence regarding the "circumstances" surrounding a crime); *State v. Dominguez*, 2003 UT App 158, ¶ 21, 72 P.2d 127 (allowing presentation of prior criminal history when presented as "context for admissible evidence").

In this case, defendant stole the Wilberts' Blazer as a means of satisfying a drug debt. When the Wilberts retrieved their Blazer, defendant followed them home, pulled out a gun, and demanded money. A confrontation then ensued that culminated in defendant firing his weapon at Michael Wilbert from a moving vehicle. Defendant's drug debt was appropriately offered to provide context for this roadside encounter, as well as to establish defendant's motive for brandishing and firing a weapon at the Wilberts.

Second, defendant's drug deal with Stacy Wilbert was relevant under rule 402. As noted above, "if the evidence has relevancy to explain the circumstances surrounding the instant crime, it is admissible for that purpose; and the fact that it may tend to connect the defendant with another crime[, wrong, or act] will not render it incompetent." *Johnson*, 784 P.2d at 1141. The drug deal in question helped explain the circumstances of the shooting at issue, and was therefore relevant under rule 402. Defendant's motive also made it more likely that defendant really did pull a gun and fire it at Michael Wilbert during their confrontation.

Third, the testimony regarding defendant's drug deal with Stacy Wilbert did not violate rule 403. As explained, rule 403 is violated when the danger of unfair prejudice substantially outweighs the probative value of the evidence in question. In this case, defendant claims that he was unfairly prejudiced because the jury learned that he was a drug dealer.

The challenged testimony did not just show that defendant was a drug dealer, but also showed that Stacy Wilbert was heavily involved with drugs as well. In fact, the State's claim was that Stacy Wilbert was defendant's drug dealer and that defendant was primarily involved in this particular drug deal as a financier. R. 343: 81-83. Thus, if testimony regarding this drug deal prejudiced the jury, that prejudice would have run both directions, thus negating the alleged prejudice to defendant. Defendant's counsel highlighted this exact dichotomy in his closing statement, referring to the State's witnesses as "all bad people," noting that "everybody is involved in drugs," and describing the State's case as being that "we've got drug dealers that are mad at each other." R. 344: 377, 386.

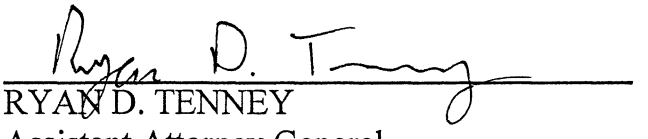
Regardless, rule 403 does not forbid all prejudicial testimony, but instead only forbids that which is "unfairly" prejudicial. The testimony regarding the drug deal did not have an undue tendency to "cause the jury to base its decision on something other than the established propositions of the case." *Lindgren*, 910 P.2d at 1272 (internal quotation marks and citation omitted). It instead focused the jury on the animus between the defendant and his victims, which was directly at issue in this crime of violence. Rule 403 was not violated by the admission of any of this testimony.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction.

Respectfully submitted July 27, 2007.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

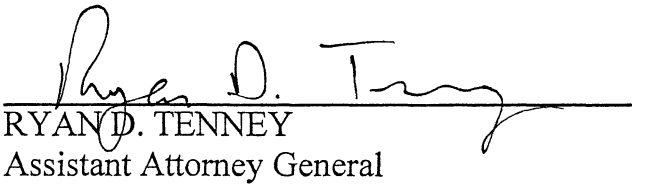


RYAN D. TENNEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, by causing them to be delivered by first class mail to his counsel of record as follows:

Randall W. Richards
2550 Washington Blvd., Ste. 300
Ogden, UT 84401



RYAN D. TENNEY
Assistant Attorney General